BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri, in the case of Alice Benner, Administratrix of the Estate of William H. Benner, Respondent, v. Terminal Railroad Association of St. Louis, a corporation, Appellant, filed on October 30, 1941, has not yet been published anywhere, but will be found on pages ... to ..., inclusive, of the printed transcript of the record herewith filed.

STATEMENT OF CASE.

The pertinent facts have been fully stated in the preceding petition for writ of certiorari. They will not, therefore, be again stated here, except such as may be necessary in connection with the presentation of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

In its opinions filed herein on October 30, 1941, the court below committed error as follows:

(1) In holding that the doctrine of res ipsa loquitur is applicable and effective in this case.

(2) In refusing to apply to this case the general rule of the federal courts that where the evidence of one party to an action is uncontradicted, unimpeached, and not violative of any physical law, or where his evidence is so overwhelmingly contrary to that of his adversary, the Court is bound to direct a verdict in his favor, for the reason that a verdict contrary to such evidence could not be permitted to stand.

(3) In holding that petitioner's evidence herein, which is uncontradicted, unimpeached and not violative of any physical law, is insufficient to require a directed verdict in petitioner's favor.

SUMMARY OF ARGUMENT.

I.

The opinion of the court below holds squarely that a servant may maintain an action under the Federal Employers' Liability Act in reliance solely on the doctrine of res ipsa loquitur. This holding is contrary to the decisions of this Court.

Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, 364;
Looney v. Metropolitan R. Co., 200 U. S. 480, 26 Sup. Ct. Rep. 303, 50 L. ed. 564;
N. O. & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167.

(a) These decisions have been so interpreted by other courts, both federal and state.

F. W. Martin v. Cobb, (8) 110 F. (2d) 159, 163, and cases cited;
Phillips Petroleum Co. v. Manning, (8) 81 F. (2d) 849;
Smith v. P. R. Co., 239 F. 103;
Petition of McAllister, 53 F. (2d) 495, 501;
President Wilson, 5 F. Supp. 684;
Kief v. C. M. & St. P. R. Co., 263 F. 529;
American Car & Foundry Co. v. Schachleweich, 229 F. 559;
Mont Briand v. C. M. & St. P. M. & O. R. Co., 191 F. 988;
New York etc. R. Co. v. Bierbacher, 110 Ohio St. 173, 143 N. E. 570;
St. L. etc. R. Co. v. Dorman, 205 Ala. 609, 89 S. 70.

(b) However, there appears language in some of this Court's decisions creating doubt of the correctness of this

interpretation placed upon the Patton, Looney and Harris Cases, and indicating the question is still open in this court.

M. & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. ed. 995;
Great Northern R. Co. v. Wiles, 240 U. S. 444, 448, 60 L. ed. 732, 734.

II.

(a) As disclosed in the summary statement of the matter involved, supra, petitioner's evidence respecting the time of the happening of the haemorrhage (which respondent's theory must embrace as the commencement of the chain of causation between the alleged electric shock and its fatal consequences) as being no more than twenty-four hours before Benner's death, is wholly uncontradicted. It must, therefore, be accepted as true. Consequently, the conclusion that the haemorrhage did not result from electric shock is inescapable, because Benner manifested abnormal symptoms within an hour or hour and a half after the alleged telephone shock—four days before the haemorrhage occurred. Under the well-established rule of this Court governing the direction of verdicts, petitioner was entitled to an instructed verdict in the trial court, and the court below erred in refusing to so hold.

Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. ed. 597;
Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720;
Southern Ry. Co. v. Walters, 284 U. S. 190, 194, 52 S. Ct. 58, 76 L. ed. 239;
Pa. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. ed. 819.

(b) Respondent's evidence as to other medical questions is so wholly insubstantial and self-contradictory as to

make petitioner's contrary evidence so overwhelming as to require a directed verdict in its favor.

See authorities last above cited.

(c) The undisputed evidence shows indubitably that Benner received no electric shock of any consequence while using the telephone. No damage was done to the fuses, the lightning arrester, any of the wires or the telephone instrument. Moreover, at the very moment it is alleged decedent received the shock, he was talking to yardmaster Jenkins, who felt no shock.

See authorities, supra (a);
Kuhlman v. Water, Light & Transit Co., 307 Mo. 607, 271 S. W. 788, 797;
Harter v. Colfax Electric Light & Power Co., 124 Iowa 500, 100 N. W. 508.

III.

(a) This Court's rule governing the direction of verdicts applies even though this were a case involving the res ipsa loquitur doctrine.

Gray v. M. & O. R. Co. (7), 24 F. (2d), l. c. 673, 674;
May Department Stores v. Bell (8), 61 F. (2d) 830, and cases cited.

(b) It is true that this Court has not as yet ruled directly upon this exact question. However, it has ruled on two analogous questions, viz., the inference of negligence created by statutes of certain states upon the happening of a casualty, and the inference against suicide which arises in certain actions upon life insurance policies.

(1) It will not be questioned that the inference created by res ipsa loquitur is an inference of fact rather than a presumption of law. The same is true of the inferences of negligence against railroad companies and of fraud upon

a bank's failure, created by certain statutes. This Court holds unequivocally that a statute which makes such an inference binding upon a jury is unconstitutional.

Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884;
Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78.

The Supreme Court of Georgia, in Snead v. State, 165 Ga. 44, 53, and the Supreme Court of Arkansas, in Heard v. Arkansas Power & Light Co., 147 S. W. (2d) 362, 364, drew the exact analogy, saying that the statutes involved in those cases, which created rebuttable inferences, did no more than does res ipsa loquitur.

(2) The inference against suicide is a strong one, but, like the inference created by statute, is completely overcome by evidence contrary to it. This Court has so declared in the following cases:

New York Life Ins. Co. v. Gamer, 313 U. S. 161, 171, 58 S. Ct. 500, 83 L. ed. 726;
Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. ed. 229;
Lincoln v. French, 105 U. S. 614.

IV.

Conceding, for the sake of argument only, that Benner was killed by an electric shock, there is no evidence that he was caused to receive it through defendant's negligence. The undisputed evidence shows the fuses and lightning arrester were standard equipment and were reasonably safe and suitable. That is sufficient to show no negligence by petitioner.

Southern Pacific Co. v. Seley, 152 U. S. 145, 153, 38 L. ed. 391, 395;
C. & N. W. R. Co. v. Bower, 241 U. S. 470, 473-474, 60 L. ed. 1107, 1109.

ARGUMENT.

I.

No doubt this Court has noticed in cases based upon the Federal Employers' Liability Act, the very sharp increase in the number bottomed upon res ipsa loquitur and violations of one or more of the Safety Appliance Acts. The upturn is too sharp and the number too great to be explained by coincidence or by a lesser degree of care on the part of employers. Employers do not suddenly become wantonly careless. The reason is to be found by searching elsewhere.

At the present time the reports of both state and federal court decisions teem with res ipsa loquitur cases, although this Court said, in M. & St. L. R. Co. v. Gotschall, 244 U. S. 66, 373 Ch. 598, 61 L. Ed. 995:

> "Negligence may not be inferred from the mere happening of an accident, **except under the most exceptional circumstances.**" (Emphasis this Court's.)

This is a positive, categorical statement of a principle which is undeniable. The doctrine arose as a rare exception to be applied with extreme caution, the reason for which is not difficult to find. While, as a matter of technical law, the burden of proving negligence even in a res ipsa loquitur case, remains upon plaintiff, nevertheless, as a matter of practice, the application of the doctrine places the burden of disproving negligence upon defendant. The trial court may charge a jury day after day that the burden of proving negligence rests upon plaintiff, yet, if he also charges at the same time that the jury has a right to "infer" negligence from undisputed facts (the fact of plaintiff's injury and the circumstances under which it occurred are practically always undisputed) unless the jury finds and believe "from other facts and circumstances in

evidence" (R. 248) that defendant was not negligent, the **practical** effect, as distinguished from the legal effect is that the jury understands that the burden of disproving negligence rests upon defendant. This theory is, of course, directly contrary to the American concept of justice, and is consonant only with the present European trend of judicial action which "prefers the interests of some to others, according to its measure of values," instead of securing "the interests by reparation and the like, treating all individuals as equal"; and which abandons "the idea of culpapibility in favor of an idea of security in which the interests of those who suffer injury without fault of others are given a higher value" (Dean Roscoe Pound, American Bar Association Journal, Volume 27, page 138, March, 1941).

Instead of the res ipsa loquitur doctrine's being a rare exception not to be applied "except under the most exceptional circumstances," it is in full favor whenever astute counsel is unable to fancy or prove negligence on defendant's part. Moreover, it is being broadened constantly.

It is recognized that this Court should not be expected to announce a governing principle more than once, whereupon it becomes the duty of all other courts to follow that principle. Like many other theories, it sounds excellent; but suppose other courts refuse to follow the holding of this Court. Are litigants to be penalized because theoretically the other courts **must** follow this Court's holding, although they actually refuse to do so? That is the unfortunate position petitioner now occupies.

There is a sharp division of opinion among the various Federal Circuit Courts of Appeals, as well as the highest state courts, as to whether or not the res ipsa loquitur theory ever applies to an action between servant and master, some of it occasioned by different interpretations of opinions of this Court.

This Court, in Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, 364, stated the rule as follows:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence."

In the later case of New Orleans and N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167, 1171, this Court reaffirmed the doctrine announced in the Patton case in an action based upon the Federal Employers' Liability Act, where this Court said:

> "The Federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish" (citing the Patton case, supra).

(a), (b) Some of the courts interpret the Patton case as indecisive because it was written before the passage of the Federal Employers' Liability Act. But, after all, that act contains nothing which would in any way diminish or increase the res ipsa loquitur rule as it stood at common law. Moreover, although the Harris case was based upon that act, this Court reaffirmed the doctrine, citing the Patton case. But the courts which desire to apply the doctrine put what we consider a strained construction upon the language of this Court in both the Patton and Harris Cases, both of which announce a broad principle which excludes application of the res ipsa loquitur principle in cases of this kind. See authorities, supra, Summary of Argument, I (a), (b).

However, some comfort is given to these courts which have (as we see it) misinterpreted this Court's language in the Patton and Harris Cases, by what this Court itself

said in Great Northern R. Co. v. Wiles, 240 U. S. 444, 448, 60 L. ed. 732, 734, which, too, was an action under the Federal Employers' Liability Act, where, speaking of the applicability of the res ipsa loquitur doctrine, this Court said:

> "The application of the doctrine to cases like that at bar is disputable. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Looney v. Metropolitan R. Co., 200 U. S. 480, 486, 50 L. ed. 564, 568, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627. We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine."

The Patton and Looney Cases are in agreement. This Court cited none in disagreement with them, and indicated in no way how the disagreement came about. There is no case from this Court in disagreement with the Patton, Harris or Looney Cases. The most that can be said of this Court's decisions is that the latest one (Wiles Case) recognizes that whether or not the doctrine applies in this character of case is disputable. Conceding that to be true, then obviously there must be a contrariety of opinion on the question. If so, the question should be promptly and finally determined, because it is difficult to conceive a more important question of railroad law, considering the great number of cases filed every year. There is but one forum where the question may be decisively determined. The public importance of such a determination is manifest. The Patton and Harris Cases (as we and many courts read them) pass upon the question; but there seems to be doubt about the holdings there announced which calls for settlement by this Court.

Moreover, as the decisions now stand plaintiff succeeds or fails in cases of this character not because the law is for or against him, but because he tries his action in a par-

ticular court. The undesirability of this condition prompted this Court in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, to overrule Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865, a decision which had stood for a great many years. This question is of almost, if not equal, importance to the question in the Erie Case.

II.

(a) From a medical viewpoint is respondent's evidence sufficient to make a prima facie case under the rules of this Court respecting the direction of verdicts? So long as this action proceeds under a federal statute it is obvious that the federal rule governs as to the sufficiency of respondent's evidence to present a jury question, even though Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, be strictly followed. Willis v. P. R. Co. (2), 122 F. (2d) 248, 250; O'Brien v. Western Union Tel. Co. (1), 113 F. (2d) 539.

The rule of this Court is clear, certain and specific that, where defendant's evidence "is undisputed, or of such conclusive character that if a verdict were returned" for plaintiff "it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for" defendant. See authorities under Summary of Argument, II, (a).

Respondent's theory is (of necessity) that Benner's death was the direct and proximate result of a subarachnoid haemorrhage produced by an electric shock. It follows this pattern: (1) haemorrhage, (2) oedema (excess fluid in the brain tissue) resulting from a blocking of brain circulation by the haemorrhage, (3) intracranial pressure (following this blocking of circulation and further increasing the fluid circulation, thereby building up such

intracranial pressure as to produce) (4) paralysis, and eventually (5) death (R. 44).

It will be recalled that the haemorrhage was scattered and tiny (R. 25), called "petechial" haemorrhage, which is so extremely small as sometimes to be invisible to the naked eye, respondent's Dr. Siebert said (R. 66). This haemorrhage occurred in the occipital portion of the skull and brain (R. 24). Respondent's own medical testimony shows that this is not the portion of the brain which contains the nerve centers which control the movements of the arms, legs, toes, fingers, etc. (R. 37). There was no haemorrhage in those centers (R. 37). Nevertheless, respondent's Dr. Connor testified that the paralysis resulted from this haemorrhage (R. 44). In other words, the haemorrhage was first both in sequence and causation. That it was the beginning of the chain of brain changes resulting in Benner's death is the foundation of respondent's case. Unless that haemorrhage was directly caused by electric shock there is a break in the chain of causation wholly fatal to respondent's case.

Because the undisputed evidence shows that Benner within an hour or an hour and a half after the telephone conversation manifested symptoms of brain disturbance, such as numbness in his hand (R. 134), difficulty in breathing (R. 138), "fumbling" while trying to make out a time slip (R. 138), difficulty in enunciation, mumbling and talking about "Ross and teaching" (a wholly incoherent remark) (R. 148), the necessary conclusion is that the condition which **caused** Benner's death began to manifest itself within an hour or an hour and a half after the telephone conversation. If it was the haemorrhage, then obviously that must have occurred prior to the manifestation of the symptoms of brain disturbance noted last above. What is the evidence on this question?

Dr. Connor, who made the first post-mortem examination, did not speak on this subject. Dr. Siebert, who made the second post-mortem examination, refused to say **when** the haemorrhage had occurred except that the degenerative brain changes (which **must** have resulted from this haemorrhage to make respondent's case stand up) occurred ante mortem (R. 69). He added, however, that "areas of degeneration would show a body reaction against them in the five days between this man's alleged injury and his death" (R. 69). The only inference to be drawn from this evidence is that there had been no body reaction and, therefore, these degenerative changes had occurred **less** than five days before. How much less? The answer is found in the testimony of two medical men who testified for petitioner. The fact that there is a body reaction is shown by respondent's evidence just mentioned. What that body reaction is appears from the uncontradicted testimony of Dr. Harris:

> "When blood escapes from the blood vessels it bebecomes, as far as the body is concerned, a foreign body, and the effort to get rid of that is started by nature within a comparatively few hours after the damage to the tissue. Now, that is an effort on the part of nature to absorb or reabsorb or take away that blood which has escaped from the blood vessels, and that is done in a very particular manner in any part of the body" (R. 205).

In his opinion the haemorrhage had occurred not more than twenty-four hours prior to death (R. 205). Dr. O'Leary thought the haemorrhage had occurred not more than twelve or even six hours before death (R. 185). This evidence of Drs. Harris and O'Leary stands undenied and unchallenged. That such body reaction occurs is admitted by respondent's Dr. Siebert (R. 69). It must, therefore, be accepted as a medical **fact** (rather than **opinion**) that this effort at reorganization **is made** by the body. The

time within which this reorganization commences does not appear in respondent's evidence, but does appear in petitioner's, and is, as stated, undisputed. It must under this Court's rulings be accepted as true, else the jury would be permitted to base its verdict upon surmise and speculation and ignore undisputed testimony which is obviously not in conflict with any natural law.

Therefore, the conclusion under the undisputed evidence is inescapable that the haemorrhage did not occur until at least four days subsequent to Benner's alleged electric shock, as he was stricken April 30, 1940, and died May 5, 1940. The manifestations of injury to Benner's brain were evident at least three days before the haemorrhage occurred. It therefore becomes conclusive that the haemorrhage was **not** first in the sequence of time or causation leading to Benner's death. Necessarily then respondent failed to make a case against petitioner.

(b) Moreover, respondent's medical evidence is contradictory, self-contradictory, and wholly unreliable.

Dr. Connor testified (R. 46) that the presence of the subarachnoid haemorrhage did not "indicate to the slightest degree" that Benner had received an electric shock. Dr. Siebert, on the other hand, testified that the haemorrhage (in connection with other pathological changes) indicated electric shock (R. 52). Dr. Connor testified a gross examination of the internal capsule was not sufficient to disclose damage to it, but a microscopic examination was required (R. 31). Dr. Siebert testified a gross examination was sufficient, and gave that as his reason for not making a microscopic examination (R. 77). Dr. Connor testified (R. 47) that a microscopic examination with special stains would be necessary to determine whether or not death resulted from electric shock, and that such an examination would disclose further whether or not the electric current

was direct or alternating. But Dr. Siebert testified that he used only the standard stain and that it would and did show "any pathological change in the brain" (R. 79).

Dr. Siebert testified that the following group of pathological changes strongly indicates death from electric shock:

(1) Oedema,

(2) Petechial haemorrhages,

(3) Dilatation of perivascular spaces,

(4) Degeneration of nerve cells,

(5) Rounded or elliptical areas of disintegration of brain tissue,

(6) Marked dilatation of the small blood vessels (R. 52, 66, 67, 68).

He stated further that these six changes very definitely typify death from electric shock (R. 53), by reason of their peculiar combination (R. 52).

He admitted, however, that "there have been many electrocution deaths in which no changes whatever were found in the body. That is even true of men electrocuted on the electric chair" (R. 51). "Electrical injuries can occur without any marked changes and without any demonstrable changes in the brain and result in paralysis. We do not know why that is" (R. 72). "In an electrical injury very often there are no changes found at all in the brain, and yet paralyses are present; in other words, we don't know exactly where this occurs. We don't find any good reason for the paralysis, but, nevertheless, the patient is paralyzed. That may occur without microscopic evidence of nerve cell injury or haemorrhage or edema" (R. 72).

Thus, we find Dr. Siebert's testimony wholly self-contradictory. The syllogism would run thus: Frequently pathological brain changes do not occur from electric shock;

Benner's brain showed pathological changes; therefore, he had suffered electric shock. This conclusion is clearly a non sequitur. Dr. Siebert's testimony is thus conclusively demonstrated to be no more than pure speculation—to speak charitably of it.

Dr. Connor, testifying for respondent, stated that during his post-mortem examination he severed the cerebellum from the cerebrum (R. 29). Following his post mortem, Dr. Connor placed the brain in the abdominal cavity, where it was found by Dr. Siebert when he commenced his post-mortem examination (R. 56). The abdominal space, which is limited, was quite full. "In fact it had been necessary to press the brain somewhat to get it in the abdominal cavity," says Dr. Siebert (R. 56). Moreover, when Dr. Siebert first examined the brain, it had been sliced, not entirely through, however (R. 56). It had been embalmed and was then covered with a hard substance which he had to remove (R. 56). In spite of these facts (especially the severance of the cerebellum), Dr. Siebert testified he saw a "pressure collar" on the cerebellum (R. 52, 57). This requires an explanation. He testified further that normally the human brain is approximately the consistency of ready-to-serve Jello (R. 57). Near the middle of the brain pan or the floor of the skull is an opening through which pass the nerve fibers from the brain to the spinal cord (Abs. pp. 52, 56). If the brain has been subjected to sufficient pressure to force the bottom of the cerebellum into the foramen or the opening through which the brain fibers pass to make the connection with the spinal cord, the bottom of the cerebellum will be forced into the spinal cord doorway, or foramen. The print of the opening on the cerebellar substance is called a "pressure collar." Dr. Siebert testified that once there exists a pressure collar it will remain forever, even though the pressure shall be removed (Abs. p. 57). He testified further that he found a pressure collar on the

cerebellar portion of decedent's brain after it had been removed from the body, had been sliced by Dr. Connor, crowded back into the abdominal space at the close of Dr. Connor's post-mortem examination, had been embalmed, in which process the brain was covered with a substance which becomes quite hard, and after he had removed that substance (Abs. p. 58).

Dr. Connor did not testify that he saw a pressure collar when he made his post-mortem examination of decedent's body, but he did testify that early in his post-mortem he turned the brain over "and cut off the brain between the cerebellum and the cerebrum" (Abs. p. 29). In other words, he separated the cerebellum from the remainder of the brain.

This testimony is so completely at variance with what must be the truth, that it can be given no credence. (1) The pressure collar, he says, was on the cerebellum which had been severed from the cerebrum; (2) the cerebellum was "somewhat harder than ordinary table jello when it is ready to serve; (3) it had been crowded into the abdominal space; (4) it had been sliced partially through; (5) it had been covered with an embalming substance which had hardened; (6) Dr. Connor, who made the first post-mortem examination, did not testify to the presence of a "pressure collar." Despite these six facts (all shown by respondent's evidence), Dr. Siebert discovered on the cerebellum the imprint of the bony opening through which the spinal cord passes. This is inevitably a shocking untruth.

Dr. Siebert testified further that he made a microscopic section through the "internal capsule" (R. 59). He just as positively testified to exactly the contrary (R. 64). From page 59 of the record to and including page 64, Dr. Siebert evaded answering the direct question whether or not he had made a section directly through the "internal capsule."

When compelled to answer categorically (R. 64), his testimony was directly contrary to what he had first sworn (R. 59).

The internal capsule is located in the cerebrum, and separates the various areas of gray matter, which, together, are called the basal ganglia. There is no such thing as an internal capsule in the cerebellum (R. 97, 177). The internal capsule is the point through which the nerve pathways from the cortex pass and converge towards their connection with the spinal cord (R. 90). These nerves cross over to the opposite side of the body so that the left half of the brain controls the right half of the body, and vice verse (R. 90). In other words, the nerve centers which control certain bodily functions are scattered over the cortex, but each finds a pathway toward the internal capsule through which it passes to the spinal cord. Necessarily, as they approach from widely-separated areas of cortex, they get closer and closer together until they reach a point where they are practically gathered into one bundle. This point is the internal capsule. It may be likened to a telephone system, the nerve fibers running from the different cortical nerve centers corresponding to the telephone lines running from the homes of the different subscribers, converging and meeting at the central office. The internal capsule is the central office of the nerve fibers of the brain.

The importance of the condition of the internal capsule cannot be overestimated in the determination of this case. Petitioner's theory advanced by its medical witnesses is that, in all human probability, the damage to Benner's brain occurred in the internal capsule, probably from an embolus or thrombus (R. 88, 89), as no haemorrhage in the occipital portion of the brain could produce the hemiplegia from which decedent suffered (R. 91). It will be remembered that the onset of Benner's attack was not sudden, but gradual. Ordinarily, where a break in a blood

vessel occurs, there results a sudden disturbance in the blood pressure which at once affects consciousness. The initial symptom then is disturbance of consciousness, dizziness followed by unconsciousness. On the other hand, in case of the blocking of a blood vessel by a thrombus or embolus, there follows a lessening of blood supply producing peculiar functional sensations. When the preliminary symptom is disturbance of consciousness, a doctor thinks of a haemorrhage, but when the preliminary symptom is disturbed function, he thinks of a blocking (R. 92, 93). This evidence is uncontradicted. Because Benner showed symptoms of disturbed function rather than disturbed consciousness, and because the only haemorrhage found by Dr. Connor was in the occipital portion of the brain, away from the nerve centers controlling the movements of one side of the body, it was the opinion of Drs. Unterberg and Harrison (R. 91, 92, 93, 98) that Benner died as a result of a thrombosis or embolism in the left internal capsule. There is no claim that this lesion was caused by electric shock.

In view of this medical evidence, it is significant that Dr. Siebert made no microscopic section of internal capsular tissue. This significance is tacitly admitted and emphasized by his attempt to testify that he had done so. As already stated, every nerve fiber which passes from any portion of the cerebrum to the spinal cord passes through either the right or left internal capsule (R. 63, 64). Necessarily, a paralysis of one-half of the body involves a lesion or lesions to those nerve centers or to all of the nerve fibers which control that side of the body. This can be caused by injury to the brain tissue (nerve centers) in the cortex, which is that portion of the brain, from one to five millimeters thick, of gray color, covering the entire surface of the brain underneath the three enclosing membranes (R. 174), or in the internal capsule. The motor nerve centers

are located in the forepart, the frontal lobe of the cerebrum immediately in front of a large fissure which constitutes the back boundary of the frontal lobe of the cerebrum (R. 34). There was no haemorrhage whatever in this portion of the brain, according to respondent's medical evidence (R. 36). Moreover, there would have to be considerable cortical damage there to produce hemiplegia (R. 33, 36). Respondent's Dr. Connor found no evidence whatever of damage to the cortex of the cerebrum adjacent to these motor areas (R. 36).

This uncontradicted evidence of respondent leaves the internal capsule as the only place where the lesion could have occurred in order to produce the result found here. Thus Dr. Siebert's failure to make a microscopic section of internal capsular tissue becomes highly significant. All the other medical evidence, including respondent's witness, Dr. Connor, shows that a lesion in the capsule the size of a small pea will cause motor-paralysis of half of the body. The fact that the minute scattered haemorrhage found by Dr. Connor was in the back portion of the brain, which everybody concedes does not contain the motor control areas, would point unerringly to the internal capsule or cortical motor areas as the place or places damaged. Therefore, given a case of right hemiplegia, with no abnormality found in that portion of the cortex which controls the movements of the right side of the body, and given further a slight haemorrhage in a portion of the brain which performs an entirely different function, and given the further fact that all of these cortical nerves which eventually reach the spinal column pass through the internal capsule, it is perfectly evident that a critical examination of the internal capsule was not only indicated, but demanded. This examination Dr. Siebert at no time made, obviously because he was afraid he would find a lesion there, which would negative electric death. The absence of a microscopic slide

containing internal capsular tissue is the most highly significant fact in all of this medical testimony. There is, and can be, no reason whatever for the failure of Dr. Siebert to include this tissue in his slides, except that he did not dare do so.

It is interesting to note Dr. Siebert's efforts to avoid a categorical answer to the question whether or not he had such a slide. He first said he made a section "of matter contained within the limits of the internal capsule" (R. 61). He was then asked which of the numbered sections contained that matter. He then said he would "rather explain it this way" (R. 61). Upon insistence that he point out the particular slide, he said, "Without looking at the microscope, this section contains **fibers** which pass through the internal capsule" (R. 61). (Note the effort to deceive.) He said that section contained "fibers" which **"pass through"** the internal capsule. But all fibers which pass from the brain to the spinal cord must "pass through" the internal capsule (R. 63, 64). Again a categorical answer was demanded, then he said, "This section contains internal **capsule** tissue" (R. 61). When asked if he meant by that answer "some of the **nerves** that go **through** the internal capsule," his answer was affirmative (R. 61). For three more pages of the record (62, 63, 64) this witness continued to evade in the same manner; finally, near the bottom of page 64, he admitted that "no section was made directly through the internal capsule."

This testimony is the principal reliance of respondent upon which to make a case. That it is intentionally misleading, evasive and self-contradictory we have demonstrated. An examination of Dr. Siebert's testimony (R. 47-85) will disclose to this Court that he seldom answered a question, but constantly made voluntary speeches, anticipated the weaknesses in his evidence and tried to strengthen his testimony in every possible manner.

We earnestly and sincerely insist that a verdict based upon such testimony is so shockingly a mockery of justice that this Court cannot give it approval.

(c) Respondent fares no better when we consider the uncontradicted physical facts immediately connected with the occurrence alleged to have produced the electric shock. These facts show conclusively that Benner could not have received an electric shock of any consequence. We enumerate them: (1) The protective fuses were not blown; (2) the lightning arrester bore no evidence of the passage of a heavy charge through it [the "burn" on the carbons was described by respondent's electrical expert as "incipient," and was so small he could not even see it with the naked eye (R. 235), and had to use a magnifying glass to discover it (R. 238)]; (3) no damage was done to the telephone instrument, physically or functionally; (4) and finally, Jenkins, to whom Benner was talking, felt no shock at all.

It is a matter of common knowledge that fuses used to protect telephones and lighting circuits are so constructed that a very small charge of electricity will "blow" them and break the connection.

The lightning arrester carbons were so slightly burned that respondent's electrical expert could discover the burns only by using a magnifying glass.

The undisputed evidence is that experimentation shows that when a standard telephone receiver is set upon a metal plate (a much better conductor than the human hand), it requires thirty-five to forty thousand volts to jump from the receiver to the metal plate (R. 171). How is it physically possible, then, for a current of electricity to have passed through with sufficient power to deliver a fatal shock to a user and at the same time neither "blow" a fuse nor "burn" the carbons in the lightning arrester?

If it requires such voltage to force a path through a telephone receiver to a good conductor, common knowledge informs us that both the fuses and the arrester would be completely demolished before the current could reach anyone through the receiver or the ringing device on the telephone.

Had a heavy charge of electricity passed through the telephone instrument, its subsequent operation would have been noisy because the line would have been grounded, according to the evidence on both sides (R. 162, 243, 244). But the line was not noisy (R. 162).

Finally, the uncontradicted evidence shows that yardmaster Ross Jenkins was talking to Benner at the very moment it is claimed Benner received his alleged shock. There was, of course, necessarily a direct physical connection between the two telephones—the wire. It is beyond reason to say Benner received a fatal electric shock, whereas Jenkins, on the other end of the line, not only was not injured, but felt no shock at all.

The Supreme Court of Missouri, in Kuhlman v. Water, Light & Transit Co., 307 Mo. 607, 271 S. W. 788, 798, said:

> "The evidence shows without dispute or question that if defendant had sent into the hotel such a current of electricity as it is claimed it did, it would have burned out the fuses in the transformer, destroyed the meter, burned out all the fuses in the fixtures, and destroyed the lights. None of these things occurred, however. * * * It is thoroughly demonstrated that defendant did not knowingly send into the hotel a current of dangerous voltage. Indeed, we are of the opinion that plaintiff could not have received the shock he claims to have had without some evidence thereof being found in the other fixtures or light of the hotel. And, as we have said, none of them were disturbed. The meter remained intact, and the transformer continued to perform its functions. None of the lights in the

hotel were in any manner affected, and none were extinguished save the one in the bathroom, which fell to the floor. The testimony shows that it was a physical impossibility for these things to exist if such a current as plaintiff claims passed through him."

The same conclusion was reached by the Supreme Court of Iowa, in Harter v. Colfax Electric Light & Power Co., 124 Iowa 500, 100 N. W. 508; and by the Supreme Court of Maryland, in Chesapeake & Potomac Telephone Co. v. Noblette, 199 A. 832, saying:

"The testimony is that there was not the slightest damage to the telephone line, nor was a single telephone service on the party line affected by electricity on the wires.

* * * * * * *

"The telephone in the mill was on a party line on which there were nine or eleven subscribers. If any one of these services were interrupted by the lightning destroying the mechanism of its telephone by fire, the service of all would be interrupted until the necessary changes and repairs were made. * * * The physical fact that the telephone service on the same party line as the mill was used after the fire started is conclusive evidence that the telephone at the mill had not been set afire by the lightning."

III.

If we assume, for argument only, that res ipsa loquitur is applicable to this case, does this Court's rule governing the direction of verdicts in all other tort actions apply?

Although this Court has not as yet passed directly on the question, the Circuit Courts of Appeals for the Seventh and Eighth Circuits have held that it does. Gray v. M. & O. R. Co. (7), 24 F. (2d), l. c. 673, 674; May Department Stores v. Bell (8), 61 F. (2d) 830, and cases cited.

(b), (1), (2). However this Court has ruled upon two

exactly analogous situations, viz., the inferences created by certain state statutes upon the happening of a casualty, and the inference against suicide.

Some of the states have passed statutes providing that if one is injured by the operation of a railroad train and so proves by his evidence, he makes a prima facie case of negligence against the railroad company. In other words, in that situation the jury is warranted in drawing an inference of negligence against defendant.

It will not be questioned that the res ipsa loquitur doctrine does no more than create an inference of negligence defendant. Sweeney v. Erving, 228 U. S. 233, 238, 33 S. Ct. 416, 418, 57 L. ed. 815, 819.

It can scarcely be denied that the inference created by res ipsa loquitur is of no more substance than that which is created by the character of statute now being discussed. Indeed, it seems clear that the statutory inference would be the stronger of the two, as it is declaratory of the policy of the particular state by its law-making body.

This Court has held that statutes of this character are unconstitutional unless they are so written that the prima facie case created by the inference inherent therein may be overthrown by defendant's evidence. This Court has gone further and held that the moment evidence antagonistic to such statutory inference comes into the case the inference is completely destroyed and the case must proceed as though the inference had never existed.

Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884;
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78.

The Supreme Courts of Georgia and Arkansas, in Snead v. State, 165 Ga. 44, 53, 139 S. E. 812, and Heard v. Arkansas Power & Light Co., 147 S. W. (2d), l. c. 364, respec-

tively, have drawn the exact analogy we draw here. The Snead case involved a statute providing that every insolvency of a bank should be deemed fraudulent, and the president and directors should be punished by imprisonment in the penitentiary. There was a proviso, however, that one prosecuted under that statute might repel the presumption of fraud by producing certain evidence. In passing on that statute the Georgia Court said, 165 Ga. 44, 53, 139 S. E. 812, that the statute itself was "but an application to a criminal case of the doctrine of res ipsa loquitur, often applied in civil proceedings."

The Arkansas Court was discussing the res ipsa loquitur doctrine and the inference by it created. After announcing the rule that the inference arising by virtue of res ipsa loquitur is completely overcome by defendant's countervailing evidence, the court said, at 147 S. W. (2d), l. c. 364:

> "In this respect it is comparable to and not distinguishable from the rule of law on our statutory presumption of negligence where a person or property is killed or injured by the operation of a train. In such a case a presumption of negligence arises from the mere happening of the incident, but it is a mere rebuttable presumption which is overcome, disappears and has no further place in the case when the railroad company offers proof of its due care."

(b) Likewise the inference or presumption against suicide is permitted to be effective only in the absence of attacking evidence. This inference of love of life is obviously at least as strong as the inference of negligence created by res ipsa loquitur. Nevertheless this Court has held that the introduction of evidence contradicting the inference against suicide takes such inference entirely out of the case.

> New York Life Ins. Co. v. Gamer, 303 U. S. 161, 171, 58 S. Ct. 500, 82 L. ed. 726.

IV.

Even though we concede that both the medical and the factual evidence is sufficient to establish Benner's death resulted from an electric shock, where is the evidence of petitioner's negligence?

Benner himself said that he did **not** receive a shock through the telephone. When asked the direct question: "Where did you get the shock, Bill; when you went to ring or take the receiver down, or where?" His answer was: "Fire—fire come down the pole" (R. 135). Benner told Dr. Canady that "he had been talking over a telephone about 6:30 and that the wires had been struck by lightning" (R. 108). The very first remark Benner made to anyone after he had talked over the telephone was: "Did you see the lightning strike the pole?" (R. 15).

The evidence is undisputed that this telephone equipment was guarded against lightning and man-made electricity of high voltage by standard equipment (R. 150, 160, 168, 232). There is no testimony that either the lightning arrester or the fuses was or were substandard or dangerous. There was some evidence that there is on the market now an arrester which two of respondent's electrical witnesses thought was better than the one used by petitioner. But no duty rests upon an employer to use the newest appliance so long as the one in use is reasonably safe and suitable, as these were shown to be.

This Court said in Southern Pacific Co. v. Seley, 152 U. S. 145, 153, 38 L. ed. 391, 395, quoting from Washington & G. R. Co. v. McDade, 135 U. S. 570, 34 L. ed. 241:

> "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound

to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed."

In the later case of C. & N. W. R. Co. v. Bower, 241 U. S. 470, 473-474, 60 L. ed. 1107, 1109, this Court reaffirmed the principle thus:

> "The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable." (Citing Cases.)

For each and all of the above reasons, petitioner urges this Court to issue its writ of certiorari herein.

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